124

(1)

Supreme Court, U.S.
FILED

No. 081215 MAR 30 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RANDY T. WARNER, M.D.,

Petitioner,

vs.

COLUMBIA/JFK MEDICAL CENTER, LLP
d/b/a/ JFK MEDICAL CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL LECHTMAN
17001 N.E. 6th Avenue
North Miami Beach, Florida 33162
Phone: (305) 652-9500

ARTHUR JOEL BERGER
Counsel of Record
for Petitioner
12531 S.W. 124 Path
Miami, Florida 33186
Phone: (305) 235-2050

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Question One: Resolving a conflict among the circuits, does a civil rights claim plaintiff have the exclusive non-shifting burden to prove that a majority of a committee, as opposed to one or more members of that committee, was unlawfully motivated by race or retaliation, if the ultimate decision at issue was made by the vote of a committee?

Question Two: Assuming that the answer to Question One is that proof of a majority is required, is that rule different where a committee is involved, but that committee is of a private entity and not a committee of a municipal government?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
BASIS FOR JURISDICTION	1
FEDERAL STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS PETITION	17
CONCLUSION	20

APPENDIX

Opinion of the Court of Appeals ..... App. 1

Proposed Jury Instruction Showing Objection ..... App. 7

Excerpt Of Transcript Showing Jury Instruction Given ..... App. 10

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985) 17

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 17

Campbell v. Rainbow City, Alabama, 434 F.3d 1306 (11th Cir. 2006) 16, 18

Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007) 19

Collins v. Nuzzo, 244 F.3d 246 (1st Cir. 2001) 19

Crocs West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) 17

Francis v. Franklin, 471 U.S. 307 (1985) 15

Haka v. Lincoln County, 533 F. Supp. 2d 895 (W. D. Wis. 2008) 19

Hunter v. Underwood, 471 U.S. 222 (1985) 17

Scott-Harris v. City of Fall River, 134 F.3d 427 (1st Cir. 1997) 18

OTHER AUTHORITIES:

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1983 ..... 2, 16, 17, 19

42 U.S.C. § 11111 11

42 U.S.C. § 11137 10

Fed. R. Civ. P. 51(d)(2) 16

PETITION FOR A WRIT OF CERTIORARI

The petitioner, RANDY T. WARNER, M.D., petitions this Court to review the final judgment and opinion of the United States Court of Appeals for the Eleventh Circuit issued in this case.

OPINION BELOW

The federal appellate court decision to be reviewed is unpublished. A copy of that typewritten document is reproduced in the appendix to this petition at App. 1-6.

BASIS FOR JURISDICTION

The decision of the lower federal appellate court was filed on December 30, 2008. This Court has jurisdiction to review this petition pursuant to Title 18 United States Code section 1254.

FEDERAL STATUTES INVOLVED

TITLE 42 UNITED STATES CODE SECTION 1981 provides in pertinent part:

> (a) Statement of equal rights.
>
> All persons within the jurisdiction of the United States shall have the same right in

every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, license, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment.

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

TITLE 42 UNITED STATES CODE SECTION 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, ... * * *

STATEMENT OF THE CASE

Petitioner, Dr. Randy Warner, filed a complaint against a hospital, Colombia/JFK Medical Center, LLP (hereafter "JFK hospital") asserting violations of Title 42 United States Code section 1981 and specifically claiming racially discriminatory and retaliatory denial of his right to make and enforce contracts. Dr. Warner stated in this verified complaint that Dr. Warner was a United States citizen who was African-American. This plaintiff demanded a jury trial.

The parties filed a joint pretrial stipulation, which did not result in agreement on much. The parties did agree on some facts, which were deemed uncontested and not requiring proof at trial. Those facts were the following: Dr. Warner was a psychiatrist, who was licensed to practice in Florida. The parties executed a recruiting agreement and a professional services agreement, both of which were denominated "the contracts." Those contracts were contingent upon Dr. Warner applying for and being granted medical staff privileges at JFK hospital.

Dr. Warner was originally from Mississippi. That doctor attended medical school in Iowa and did his postgraduate training in Mobile, Alabama and Houston, Texas. Dr. Warner took a position as a psychiatrist in Southern Mississippi. In the fall of 1999, Dr. Warner went into private practice in Biloxi, Mississippi and worked with Drs. Havas, Tucker and Pyle. Deciding to leave Biloxi, Dr. Warner dealt with a headhunter who referred him to JFK hospital.

On October 21, 2003, Ms. Passerella, vice president of JFK hospital for Marketing and Physician Services, sent a letter to Dr. Warner to entice Dr. Warner to come to JFK hospital in Atlantis, Florida, based on receipt of Dr. Warner's curriculum vita from the headhunter. JFK was a 426-bed hospital. Dr. Warner came to that hospital and was given a tour by Ms. Passerella and Dr. Pasternak. Ms. Passerella made an offer of a guaranteed income. On January 29, 2004, the Hospital Chief Executive Officer signed the previously mentioned contract, namely the Professional Services Agreement and Recruiting Agreement Addendum. On February 1, 2004, Dr. Warner signed both of those agreements. According to those documents, Dr. Warner was to start work at JFK hospital on May 1, 2004. This contract was to last until April 30, 2007. However, there was a requirement that Dr. Warner obtain a physician's license from the State of Florida and both obtain and maintain full medical staff privileges at JFK hospital. Dr. Warner was guaranteed almost $ 300,000.00 for the first year of work.

At this time, Dr. Warner had been practicing as a physician for eight years. Dr. Warner was in the process of becoming board certified in an area of medicine (psychiatry) at the time he applied to JFK hospital and became Board Certified in 2004.

Dr. Warner started to phase out his practice in Mississippi, sold his home in Mississippi, purchased a home in Delray Beach, Florida and moved to Florida about April 1, 2004.

On April 28, 2004 – just days before Dr. Warner was scheduled to start work – he received a call from Ms. Simon, who was director of the JFK hospital medical staff, telling Dr. Warner that he had to attend a credentials committee meeting on May 11, 2004, but did not tell Dr. Warner the specific reason he had to appear. On May 7, 2004, Dr. Warner attempted to get more information by calling Ms. Simon and was referred to Dr. Behrens, who was the chairman of JFK hospital credentials committee. Dr. Warner called Dr. Behrens and still was told nothing. Because of that lack of information, Dr. Warner was not able to prepare anything in advance of the May 11th meeting to address any concerns. Dr. Warner called again on May 10th and was told that he should appear at 6:00 p.m. and that this concerned the failure of Dr. Warner to mention Texas licensure in his application.

On May 11th, Dr. Warner went to the JFK hospital to appear before the credentials committee meeting. Dr. Warner had to wait alone in the hall for about one-half hour. According to Dr. Warner, when he walked into the meeting room, there were people everywhere and he was being glared at. Dr. Warner was the only African-American in that room. There were no nods or smiles from those other persons. Dr. Warner believed the atmosphere to be a hostile situation. Dr. Warner was not introduced to those in the room. Dr. Warner explained that he did not list his Texas license, because he only listed the licenses that he currently possessed, namely medical licenses

from Mississippi and Georgia. Dr. Warner thought that this ended the inquiry, based on what Dr. Warner had been told. However, various people began throwing questions at him on various subjects, including his views on providing indigent care, although there was an indigent care requirement in the contract he had signed with JFK hospital. Dr. Warner viewed his inquisitors as acting rudely toward him and badgering him. Dr. Warner then left the room and the hospital.

Unknown to Dr. Warner, shortly after he left the meeting, the credentials committee voted to recommend to the Medical Executive Committee that Dr. Warner receive medical staff membership and clinical privileges. The committee minutes state that "there did not appear to be any technical reason to deny appointment." There was discussion that Dr. Warner seemed confrontational and adversarial during the interview and that this "may be a precursor to his ability to relate in a congenial manner with the hospital medical staff personnel and patients during his tenure." Members of the committee felt that Dr. Warner's demeanor during the interview "may have been reflective of his own concerns."

The next morning after a restless night, i.e., May 12th, Dr. Warner called Ms. Passerella and sent her a letter in which he explained his feelings about how he was treated during this credentials committee meeting. Among the things mentioned, Dr. Warner stated that he felt that this meeting was conducted "with bias/or discrimination." "I thought that I had left

ignorance, bias, prejudice, intolerance and discrimination back in [S]outh [Mississippi], deep in the heart of Dixie." "I also found it interesting that in the year 2004 that there was not a single person of African descent present in the committee in an institution the size of JFK." Following the closing of that letter, there was indication that Dr. Warner had sent carbon copies of this letter to attorney Johnnie Cochran, the NAACP, the National Medical Association[1], the American Civil Liberties Union, and the Florida Board of Medical Licensure.

In the early morning of May 13th, Dr. Warner was called by Ms. Passerella and told that this letter had been disseminated and had not been received well. There was a further exchange of emails between Dr. Warner and Ms. Passerella, in one of which Dr. Warner emailed Ms. Passerella that "we agreed that you would read my fax."

Although Dr. Warner sent his May 12th letter to the vice president of physicians services and business development at JFK hospital, who had solicited Dr. Warner to sign his contracts with JFK hospital, that letter was distributed to the chief executive officer of JFK hospital and the attorneys for JFK hospital were called because of possible litigation.

---

[1] The National Medical Association is similar to the American Medical Association, but for African-American doctors. That organization was founded in 1895, at a time when the American Medical Association admitted only white physicians.

The chief executive officer of the hospital had that May 12th letter placed before the medical executive committee of the hospital for consideration at its May 24th meeting.

On May 13th, Dr. Warner wrote to Dr. Arrascue, who was then president (chief) of the JFK hospital's medical staff and presiding officer of the medical executive committee of JFK hospital and who had been at the credentials committee meeting. In this letter to Dr. Arrascue, Dr. Warner forwarded documents "that I would have presented at the credentialing committee had I been briefed about the concerns of the committee beforehand." This letter discussed the May 12th letter to Ms. Passerella. That letter ended: "In no way do I want to create an adversarial relationship with JFK medical center or any of my physician colleagues. I just expect to be treated fairly and believe that there is nothing in my background to substantiate denial of full privileges at JFK." In this letter, Dr. Warner requested that he be contacted by Dr. Arrascue and concluded, "Highest Regards."

On May 14th, Dr. Warner was invited to a meeting with Ms. Melby, the Chief Executive Officer of JFK hospital. The apparent intent was to do damage control. Dr. Warner complained as to the irate manner that this CEO talked to him, mentioning Rosa Parks. Ms. Melby told Dr. Warner that she did not appreciate his letter and the fact that Dr. Warner made this racial. Dr. Warner left. Thereafter, Dr. Warner exchanged additional emails with Ms. Passerella on May 14th, May 21st and May 23rd.

The retaliation claim was based on what was done at the Medical Executive Committee meeting.

On May 24th, the medical executive committee met to determine if Dr. Warner would be approved for privileges at JFK hospital, following the recommendation in favor of approval that had been obtained from the credentials committee of JFK hospital. All that Dr. Warner had available to him regarding what occurred at that meeting were the written minutes of this May 24th meeting. This committee consisted of eighteen members, seven of whom had been on the credentials committee that had approved Dr. Warner. That committee included both the present and a former chief of the medical staff, i.e. Drs. Arrascue and Behrens. Twelve other non-physician members of the hospital were also in attendance, including the vice president of physicians services and business development at JFK hospital (Passerella), the assistant vice president of administrative services at JFK hospital who was the risk manager at JFK hospital (Morgan), and the chief executive officer of JFK hospital (Melby). Dr. Warner was not at this meeting.

The minutes of that May 24th meeting do not record the actual vote of the committee members regarding Dr. Warner's privileges and do not contain any recorded verbal discussion of who said what at that meeting regarding Dr. Warner. Nevertheless, there was an admission that the May 12th letter was discussed at that meeting prior to the vote on Dr. Warner. Additionally, the minutes mention that the May 12th letter from Dr. Warner stated Dr. Warner's

belief that the conduct of the credentials committee had been "inappropriate and discriminatory" and that the administration had been advised by Dr. Warner of his perception of "unfair and discriminating practices." The minutes state: "Motion was made, seconded and accepted to **offer Dr. Warner the opportunity to withdraw his application for privileges. If Dr. Warner chooses not to withdraw his application, his application would be denied** on the basis of discrepancies, references and inability to work with others."

In 1986, Congress enacted the Healthcare Quality Improvement Act. Hospitals *must* report the name of any person who was denied clinical privileges by the hospital's professional review body to the board of medical examiners subject to federal government dissemination. 42 U.S.C. § 11133, 11134, 11151(1), (3), (4)(A), (5), (9), (10), and (11). The federal government is required by Congress to report upon request this adverse action to all state licensing boards, to hospitals and to other health care entities that may be entering into an employment or affiliation relationship with the physician to which that physician has applied for clinical privileges or appointment to the medical staff. 42 U.S.C. § 11137.[2] Congress has

---

[2] Such a report leaves a permanent mark on a physician's record, and can prevent that doctor from obtaining a future license from a state and future employment at a hospital or other medical facility. At the very least, such a report means that the physician will have to explain that denial of privileges with the hope that his explanation is believed. Obviously, the

(Continued on following page)

granted hospitals immunity from damage suits for conducting a professional review. However, this immunity does not apply to lawsuits predicated on Title 42 United States Code section 1981. 42 U.S.C. § 11111.

The chief of staff (Arrascue), who was a member of the medical executive committee, testified that the ultimate decision was the committee's decision and not his decision. The former chief of staff (Behrens) testified that he could not know if any member of the medical executive committee voted to retaliate against Dr. Warner for the May 12th letter. Dr. Behrens admitted that the May 12th letter personally offended him and that this letter made Dr. Behrens angry. Dr. Behrens believed that it was the May 12th letter that caused the adverse vote of the medical executive committee.

What allegedly happened on May 24th during the Medical Executive Committee Meeting could not be refuted directly by Dr. Warner, because neither Dr. Warner nor an agent of Dr. Warner was permitted to attend that meeting. Rather, Dr. Warner was limited to circumstantial evidence of pretext. Dr. Warner introduced both testimony and documentary evidence to establish that any effort at justifying the May 24th adverse action of the Medical Executive Committee regarding Dr. Warner's right to practice

---

threat to make such a report and blacklist Dr. Warner may properly be characterized as blackmail.

at the hospital was a pretext and not the real reason for what was done to Dr. Warner.

Dr. Warner received a letter from Dr. Arrascue, which was dated May 25, 2004. That letter stated that the Medical Executive Committee met on May 24th and decided "to deny your request for appointment to the medical staff." The concerns, "includ[ed] but [were] not limited to" omissions within his application, unsatisfactory information received from his references[3], and his ability to work with others, "raising serious doubts about your qualifications and suitability for the clinical privileges you requested. Accordingly the [Medical Executive Committee] has determined that you do not warrant a grant of privileges at this time." This letter informed Dr. Warner of his right to request a further hearing.

Verbally, Dr. Arrascue told Dr. Warner that if his privileges were denied, that information would be sent to the National Practitioner Data Bank "as my first and only blemish." Dr. Arrascue also stated that Dr. Warner was being offered "the opportunity to withdraw your application and not have . . . a negative report go onto your National Practitioner Database."

---

[3] The only arguably negative reference was from a Dr. Pyle. When Dr. Warner learned of that fact, Dr. Warner sent Dr. Arrascue the glowing reference about Dr. Warner that was from the same Dr. Pyle and which had been written September of 2003.

On May 27, 2007 at 2:46 p.m., Dr. Warner faxed a letter to Dr. Arrascue accepting Dr. Arrascue's telephone offer to withdraw his application to avoid reporting of the denial of his application for privileges to the National Practitioner Data Bank.[4] Two hours later at 4:30 p.m., Dr. Warner sent an addendum retracting his withdrawal and requesting a further hearing. On June 1, 2004, a law firm wrote to Dr. Warner stating that his initial withdrawal request had been accepted and would not be altered by Dr. Warner's latter change of instructions.

The defense aggressively testified to counter Dr. Warner's case. The defense called (1) Dr. Behrens, who was the chairman of JFK hospital's credentials committee, was also on JFK hospital's medical executive committee, and, prior to that, was chief of the medical staff at JFK hospital, as well as chairman of JFK hospital's medical executive committee; (2) Ms. Simon, who was the director of JFK hospital's medical staff; (3) Ms. Passerella who was vice president of physicians services and business development at JFK hospital; (4) Ms. Morgan, who was the assistant vice president of administrative services at JFK hospital and was the risk manager at JFK hospital; (5) Ms. Melby, who was the chief executive officer of JFK hospital; and (6) Dr. Arrascue, who was chief (president) of the medical staff at JFK hospital and

---

[4] In that letter, Dr. Warner made additional explanation about why he felt that he had to withdraw his application.

chairman of JFK hospital's medical executive committee.

The essence of the defense testimony was that Dr. Warner was denied privileges at the JFK medical executive committee because of concerns about his ability to deal with physicians already permitted to practice at JFK hospital and other JFK hospital staff. According to the defense witnesses, Dr. Warner's race was never an issue. According to the defense, what was done to Dr. Warner was not done to retaliate because of Dr. Warner's May 12th letter received by Ms. Passerella.

The United States Court of Appeals for the Eleventh Circuit published "pattern," i.e. standard, jury instructions for civil cases within its jurisdiction. The defense submitted non-standard jury instructions, one of which is contained in the appendix to this petition. (App. 7-9). The trial judge sustained Dr. Warner's objection to almost all of the particular non-standard proposed jury instruction at issue here. Over Dr. Warner's objection, the trial court charged the jury with one portion of that particular defense-requested non-standard jury instruction.[5] The following jury instruction was given to the jury. "The jury should note the decision here to deny employment to the Plaintiff was made not by an individual but by a

---

[5] The trial judge sustained the plaintiff's objection to most of that particular defense-proposed non-standard jury instruction.

committee. Under those circumstances, it is not enough for the Plaintiff to prove that a single person was lawfully motivated by race or retaliation. Instead, the Plaintiff must prove that a majority of the Committee was unlawfully motivated by race or retaliation." (App. 10-11).

Under these factual circumstances and based on this contested jury instruction, the jury **had** to rule for the defendant hospital. The jury **never** had to consider any of the other testimony or even evaluate credibility of the witnesses prior to denying all relief to Dr. Warner. The courts presume that jurors attend closely to the language of a trial court's instructions and follow the jury instructions given to that jury. *Francis v. Franklin*, 471 U.S. 307, 325 (1985).

On appeal, Dr. Warner argued that the giving of this jury instruction was reversible error. Dr. Warner noted that the precedent of the United States Court of Appeals appeared to support the giving of this instruction and acknowledged circuit law that this precedent was binding in this appeal. However, Dr. Warner argued that this law was erroneously applied to Dr. Warner's factual situation. Dr. Warner informed the lower appellate court that there was conflict among the circuits regarding the law that the lower appellate court espoused and that the law of another circuit would have warranted rejection of the particular instruction that was given to Dr. Warner's jury. Dr. Warner expressly informed the Eleventh Circuit that the other-circuit law was brought to that lower appellate court's attention for

the purpose of preservation of the legal issue for review in the Supreme Court of the United States.

The lower appellate court ruled against Dr. Warner. In its opinion, (App. 1-6), the Eleventh Circuit evaluated this jury instruction issue under that circuit's law on plain error, pursuant to Federal Rule of Civil Procedure 51(d)(2). Although conceding that Dr. Warner made a timely objection to this jury instruction, that appellate court determined that Dr. Warner did not "distinctly" argue the identical grounds for his objection to those jury instructions that he argued on appeal.

The Eleventh Circuit treated its pertinent law regarding a civil rights claim made pursuant to Title 42 United States Code section 1983 as applicable to Dr. Warner's civil rights claim made pursuant to Title 42 United States Code section 1981. Implicitly recognizing the conflict of its law with that of other circuits, the Eleventh Circuit ruled: "In this case, the jury instruction as given would not have misled the jury. In fact, the instruction given was a correct statement of the law in this circuit. See Campbell v. Rainbow City, Ala., 434 F.3d 1306, 1313 (11th Cir. 2006). As such, Warner cannot show plain error."

REASONS FOR GRANTING THIS PETITION

Title 42 United States Code section 1981 permits claims of retaliation. *Crocs West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

This Court has never addressed the questions presented by this petition. However, this Court has not been ignorant of the importance of this petition to civil rights litigation. In a unanimous opinion involving a law suit under 42 U.S.C. §§ 1981 and 1983, this Court stated: "Proving the motivation behind official action is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985), this Court confronted the factual scenario of job application discrimination in the context of a municipal city selection committee vote, where the committee had five members. This Court predicated that decision on the fact that the finder of fact had a basis to find that the defendant was subject to discrimination. In that case, four men voted for a younger male and the only woman on that committee voted for the plaintiff in that law suit. Thus, a majority vote was found to be discriminatory.

In *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), this Court confronted a claim of racial discrimination against the city, as a result of a decision of a city council committee. However, this Court resolved a retaliation verdict based upon the concept of legislative immunity. The city's liability for retaliation had been overturned by the lower appellate court and,

therefore, this Court never addressed this issue although this issue was discussed in the lower appellate court opinion in *Scott-Harris v. City of Fall River*, 134 F.3d 427, 437 (1st Cir. 1997), which opinion verbalized this issue as: "How many municipal legislators (or, put another way, what percentage of the legislative body) must be spurred by a constitutionally impermissible motive before the municipality itself may be held liable under section 1983 for the adoption of a facially neutral policy or ordinance? This is a difficult question, and the case law proves a fickle companion." That lower court noted the split of authority in the lower courts, both state and federal.

As was stated in *Scott-Harris v. City of Fall River*, 134 F.3d 427, 438 (1st Cir. 1997): "The precedent in this area is uncertain, and persuasive arguments can be made on both sides. On the one hand, because a municipal ordinance can become law only by a majority vote of the city council, there is a certain incongruity in allowing fewer than a majority of the council members to subject the city to liability under section 1983. On the other hand, because discriminatory animus is insidious and a clever pretext can be hard to unmask, the law sometimes constructs procedural devices to ease a victim's burden of proof."

The Second Circuit rejected the Eleventh Circuit's rule, most recently expressed in *Campbell v. Rainbow City, Alabama*, 434 F.3d 1306 (11th Cir. 2006), that a civil rights plaintiff must demonstrate that a majority of a public body acted with racial

animus in order to hold that municipal body liable for a constitutional violation. The Second Circuit held that all that was required of the plaintiff was proof that strongly indicates that discrimination was a significant reason for a public body's actions. The public body would have to counter that evidence with its own clear evidence that a majority acted with permissible motives. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 786 (2d Cir. 2007). Following the Second Circuit, *Haka v. Lincoln County*, 533 F. Supp. 2d 895 (W. D. Wis. 2008) held that one member's animus may be enough to change the result of a group vote, because of a closely divided vote or because that member influenced the vote of other members. Other courts established a "middle of the road" approach to this issue. *E.g.*, *Collins v. Nuzzo*, 244 F.3d 246, 251 (1st Cir. 2001), permitting one member's bad motive to be imputed to a legislative body for section 1983 liability if the plaintiff shows both a bad motive on the part of at least a significant bloc of legislators and circumstances suggesting probable complicity of others.

In the context of private meetings by private entities, even those that operate by use of committees, the misapplication of this body of law pertaining to public governmental bodies makes those private entities judgment proof under Title 42 United States Code section 1981. Unlike public bodies, committee votes of private entities are not voted on in the sunshine where the public can record the votes and statements of members of that public body. Indeed,

neutral witnesses can testify to the effect of those speeches on others. That is especially true if the deliberations of that public body are recorded on video.

In Dr. Warner's case, the meeting was held in secret and was not open to the public. There was no requirement that anyone could listen to what occurred at this meeting. There was no requirement that the discussion be recorded. There was no requirement that the vote be recorded specifically as to who voted how or why. The statements of no member could be known. Nor could the dynamics of that meeting be exposed to public scrutiny. Under the law followed in this jury instruction, Dr. Warner **had** to lose.

This Court should resolve this conflict among the lower courts.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR JOEL BERGER
Counsel for Petitioner
12531 S.W. 124 Path
Miami, Florida 33186
Phone: (305) 235-2050

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11403
Non-Argument Calendar

D. C. Docket No. 07-80083-CV-LRJ

M.D. RANDY T. WARNER,

Plaintiff-Appellant,

versus

COLUMBIA/JFK MEDICAL
CENTER, LLP, d.b.a.
JFK Medical Center,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(December 30, 2008)

Before ANDERSON, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

Randy Warner appeals the judgment entered on a jury verdict in favor of Colombia/JFK Medical

Center in his employment discrimination and retaliation action, brought pursuant to 42 U.S.C. § 1981. For the reasons that follow, we affirm.

Warner, a black psychiatrist recruited by the Medical Center for a position as a psychiatrist on the hospital's medical staff, filed a § 1981 action alleging discrimination and retaliation during the hospital's credentialing process. According to the record, after being recruited for a position with the hospital, Warner relocated his practice to Florida and began the credentialing process. The terms of Warner's employment contract provided that his position was contingent upon him receiving privileges at the Medical Center. Warner submitted an application for privileges and was called for an interview. Dissatisfied with the interview process, Warner accused various hospital administrators and members of the credentialing committee of discrimination. Although the committee initially voted to grant privileges, after Warner expressed his outrage at the way he thought he was treated, the committee concluded that they would be unable to engage in a working relationship with Warner and it denied privileges. As a result, Warner lost his employment with the hospital.

The case proceeded to a jury trial before a magistrate judge. When the parties submitted proposed jury instructions, Warner objected to the Medical Center's proposed instruction 16, which stated, in relevant part, "[t]he decision here to deny employment to the plaintiff was made not by an individual but by a Committee. Under those circumstances, it is

not enough for the plaintiff to prove that a single person was unlawfully motivated by race or retaliation. Instead, plaintiff must prove that a majority of the Committee were unlawfully motivated by race or retaliation." To signify his objection, Warner identified this proposed instruction in bold typeface. He did not, however, submit any written objection.

At the charge conference, Warner stated that the instruction should not be given because "I think the last paragraph is certainly arguing Defendant's case." The Medical Center responded that the proposed instruction would clarify a missing element of the pattern instructions and was crucial to its case. Warner raised no other objection, and the court instructed the jury per the proposed instruction. The jury found in favor of the Medical Center, specifically finding that Warner did not engage in a protected interest and that neither race nor retaliation was a substantial or motivating factor in the committee's decision.

In his appeal, Warner challenges the proposed jury instruction as an inaccurate statement of the law. He contends the instruction applied to cases brought pursuant to 42 U.S.C. § 1983, but that § 1981 cases applied different law.

We accord the trial judge "wide discretion as to the style and wording employed" in jury instructions. *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997) (citing *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996)). "This court examines

jury instructions as a whole to determine whether they fairly and adequately addressed the issue and correctly stated the law." *Christopher v. Cutter Laboratories,* 53 F.3d 1184, 1190 (11th Cir. 1995).

Under Federal Rule of Civil Procedure ("Rule") 51, "no party may assign as error an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" Fed. R. Civ. P. 51 (emphasis added). This court interprets Rule 51 strictly; thus, a party must to object to a jury instruction prior to jury deliberations in order to preserve the issue on appeal. *Landsman Packing Co. v. Continental Can Co.,* 864 F.2d 721, 726 (11th Cir. 1989) (citation omitted). The failure to make a timely objection waives the right to raise the issue on appeal. *See Wood v. President of Spring Hill College,* 978 F.2d 1214, 1221 (11th Cir. 1992); *Golub v. J.W. Gant & Assocs.,* 863 F.2d 1516, 1521 (11th Cir. 1989). This requirement ensures that a trial judge has an opportunity to correct any error before a jury has begun its deliberations. *See Landsman,* 864 F.2d at 726 (citation omitted). There is a plain error exception to this rule that permits a court to consider an issue "where it is necessary to 'correct a fundamental error or prevent a miscarriage of justice." *Landsman,* 864 F.2d at 726 (citation omitted); *see also Wood,* 978 F.2d at 1221.

Here, a review of the record confirms that, although Warner's objection at trial was timely under Rule 51, he failed to state "distinctly the matter

objected to and the grounds of the objection." Fed. R. Civ. P. 51. Warner did not explain the grounds for his objection and his argument at the charge conference failed to put the court on notice of the grounds or to give the court an opportunity to correct any error. *Bendiburg v. Dempsey,* 19 F.3d 557, 562 (11th Cir. 1994). Accordingly, Warner has waived his argument that the instruction was erroneous.

Even if we were to apply the plain error exception, Warner cannot show plain error.[1] In the context of jury instructions in a civil case,

> [p]lain error review is an extremely stringent form of review. . . . [R]eversal for plain error in the jury instructions or verdict form will occur only in exceptional cases where the error is so fundamental as to result in a miscarriage of justice. To meet this stringent standard, a party must prove that the challenged instruction was an incorrect statement of the law and [that] it was probably responsible for an incorrect verdict, leading to substantial injustice. This element is satisfied if a party proves that the instruction will mislead the jury or leave the jury to

---

[1] We note Warner argues there is a distinction between § 1981 and § 1983 cases for the first time on appeal. We do not consider this argument. *Sierra Club, Inc. v. Leavitt,* 488 F.3d 904, 912 (11th Cir. 2007); *see also Formby v. Farmers & Merchants Bank,* 904 F.2d 627, 633 n.10 (11th Cir. 1990) (explaining that objecting on one ground does not preserve other, unstated objections for appeal).

> speculate as to an essential point of law. In other words, the error of law must be so prejudicial as to have affected the outcome of the proceedings.

Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329-30 (11th Cir. 1999) (citations and internal quotation marks omitted).

In this case, the jury instruction as given would not have misled the jury. In fact, the instruction given was a correct statement of the law in this circuit. *See Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006). As such, Warner cannot show plain error.

Accordingly, we AFFIRM.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80083-CIV-
MIDDLEBROOKS/JOHNSON

RANDY T. WARNER, M.D.,

Plaintiff,

v.

COLUMBIA/JFK MEDICAL CENTER, LLP d/b/a JFK MEDICAL CENTER,

Defendant. /

JOINT PROPOSED JURY INSTRUCTIONS

Pursuant to this Court's Order setting this matter for jury trial,[1] the parties to hereby submit the following proposed Jury Instructions.

* * *

PROPOSED JURY INSTRUCTION NO. 16

Summary – Motivating Factor
(Including Decision By A Committee)

The Defendant contends that its actions toward the Plaintiff were not motivated by unlawful race or retaliation, but because of

[1] All joint instructions are in Times New Roman 14 point plain text. All of Plaintiff's Instructions objected to by Defendant are *italicized* and all of Defendant's Instructions objected to by Plaintiff are in **bold** face.

three factors. First, because there were discrepancies in the Plaintiff's application for employment. Second, because the Plaintiff received a bad reference indicating that he could not work well with others. And third, because the Plaintiff demonstrated during the application process an inability to work well with others.

I instruct you that each of these three factors can quality as a legitimate business reason for the Defendant's actions.[30] You must decide, then, whether those were the real reasons the Defendant did not ultimately hire the Plaintiff, or whether the Defendant instead was motivated by race or retaliation.

That is, the Plaintiff must prove by a preponderance of the evidence that his race or retaliation was "a substantial motivating factor" in the Defendant's decision to deny him employment. To do so, Plaintiff must show that his race or retaliation was a determinative, although not necessarily the sole, decision-making factor. In other words, Plaintiff must

---

[30] *Jamerson v. Board of Trustees of Univ. of Ala.*, 662 F.2d 320, 324-25 (5th Cir. Unit B Nov. 23, 1981) (inability to get along with others was legitimate business reason for employment action); *Cooper v. Dep't of Admin. of Nevada*, 558 F.Supp. 244, 257 (D. Nev. 1982) (same); *Huffaker v. Bailey*, 540 P.2d 1398, 1401-02 (Ore. 1975) (same).

prove to you that *but for* his race or retaliation, Defendant would have employed him.[31]

Finally, the decision here to deny employment to the Plaintiff was made not by an individual but by a Committee. Under those circumstances, it is not enough for the Plaintiff to prove that a single person was unlawfully motivated by race or retaliation. Instead, the Plaintiff must prove that a majority of the Committee were unlawfully motivated by race or retaliation.[32]

Given _____
Give as Modified _____
Denied _____
Withdrawn _____

---

[31] *Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322 (11th Cir. 1999); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996).

[32] *Rolle v. Worth County School District*, 128 Fed. Appx. 731, 733 (11th Cir. 2005); *Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001).

[963] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RANDY T. WARNER, M.D., Plaintiff, -v- COLUMBIA/JFK MEDICAL CENTER, LLP, Defendant.	Case No. 07-80083-CIV-JOHNSON West Palm Beach, Florida February 29, 2008

VOLUME 5 – PAGES 963-1138
TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE LINNEA R. JOHNSON
U.S. MAGISTRATE JUDGE

* * *

[1103] (A recess was taken form 12:35 p.m. to 1:36 p.m., after which the following proceedings were had:)

THE COURT: All right. We can bring in the jury, then.

(The jury enters the courtroom, after which the following proceedings were had:)

THE COURT: Thank you very much.

I hope you had an enjoyable lunch, and we are at the conclusion of the trial shortly. I'm going to give you some instructions. . . .

* * *

[1115] The jury should note the decision here to deny employment to the Plaintiff was made not by an individual but by a committee. Under those circumstances, it is not enough for the Plaintiff to prove that a single person was unlawfully motivated by race or retaliation. Instead, the Plaintiff must prove that a majority of the committee was unlawfully motivated by race or retaliation.